

VENABLE, BAETJER, HOWARD & CIVILETTI, LLP  
Including professional corporations

1201 New York Avenue, N.W., Suite 1000  
Washington, D.C. 20005-3917  
(202) 962-4800, Fax (202) 962-8300  
www.venable.com

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**VENABLE**  
ATTORNEYS AT LAW

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October 16, 1997

**VIA Messenger**

William F. Caton, Acting Secretary  
Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, DC 20554

RECEIVED

OCT 16 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: MM Docket No. 95-176 - Petition for Reconsideration

Dear Mr. Caton:

Enclosed for filing please find an original and eleven (11) copies of NIMA International's Petition for Reconsideration in the above-referenced docket.

We are also this day forwarding two (2) copies of the Petition to the Cable Services Bureau.

Finally, we are also sending one (1) extra copy of the Petition, which we ask that you date-stamp and return to the messenger. We appreciate your assistance.

Please do not hesitate to contact me if you have any questions.

Sincerely,

*Heather L. McDowell (ps)*

Heather L. McDowell

Enclosures

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OCT 16 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARYFEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Closed Captioning and Video Description	)	
of Video Programming	)	
	)	MM Docket No. 95-176
Implementation of Section 305 of the	)	
Telecommunications Act of 1996	)	
	)	
Video Programming Accessibility	)	

**NIMA INTERNATIONAL PETITION FOR RECONSIDERATION**

Pursuant to section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, NIMA International ("NIMA") hereby petitions the Commission for reconsideration of its decision to require closed captioning of long-form advertising, including television shopping programs, and its standards for applying revenue-based exemptions for the new closed captioning rules. By separate petition, NIMA has further requested that, pursuant to sections 1.43, 1.44(e), and 1.429(k) of its rules, 47 C.F.R. §§ 1.43, 1.44(e), and 1.429(k), the Commission immediately stay application of its closed captioning rules to long-form advertising pending its ruling on this Petition for Reconsideration.

**A. SUMMARY**

NIMA is a trade organization comprised of the leading long- and short-form direct response marketers and producers, television shopping networks, advertising agencies, media buyers, cable television networks, and broadcast stations. NIMA was a party to the Commission's rulemaking to implement the closed captioning requirements of the Telecommunications Act of 1996, and opposed mandatory captioning of long-form

advertising because the burdens associated with captioning such programming will outweigh the marginal benefits (if any) of adding captions. The Commission's subsequent decision to impose closed captioning on these programs fails to recognize vast differences between long-form advertising and other programming.

Neither of the Commission's revenue-based exemptions will provide any relief for small infomercial providers. The exemptions are tied to revenue derived from a specific channel, but infomercial advertisers do not generate revenue from any particular channel; their revenues are derived from sales of products or services directly to consumers. Thus, even in affording economic relief for some providers, the Commission failed to consider the way that long-form advertising is produced and distributed. Moreover, the difficulty of applying the revenue-based exemptions to long-form advertising further exposes the flaws inherent in requiring such programming to be closed captioned in the first instance.

NIMA, therefore, asks that the Commission reconsider its decision to require closed captioning of long-form advertising, including television shopping programs. At the very least, the Commission should re-examine its decision to measure the revenue-based exemptions against channel-derived revenue, and instead allow long-form infomercial advertisers to avail themselves of the exemption based on product sales revenues. Furthermore, unlike virtually every other person or entity subject to the rules, infomercial advertisers will be forced to caption every single program that they air after January 1, 1998. NIMA thus also urges the Commission to grant its separately-filed Petition for Stay.

**B. THE COMMISSION ERRED IN ITS DECISION TO REQUIRE CLOSED CAPTIONING OF LONG-FORM ADVERTISING**

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The Closed Captioning Order<sup>1/</sup> either misperceives or ignores the unique character of long-form advertising, including the fact that these programs are accessible to the hearing impaired without captions. The Commission rests its decision on nothing but the conclusory remark that "the burdens and benefits of captioning are likely to be analogous to those for traditional pre-recorded programming."<sup>2/</sup> This is wrong as a factual matter. Infomercial advertising and traditional programming are similar in only two respects: Both are pre-recorded and nationally distributed. That, however, is where the similarities end for purposes of determining whether long-form advertising should be captioned. First, traditional programming contains little, if any, graphical or textual material. Direct response television, on the other hand, already provides viewers with the material information they need to understand the programming through graphics and superimposed text. *The purpose behind long-form television advertising is to invite product sales based on visual images.* At no point in its decision does the Commission factor this reality into its determination to impose mandatory captioning on long-form advertising. The Commission's Order does not contain even a hint of explanation or justification for imposing mandatory captioning on long-form advertising despite use of carefully crafted visual demonstrations of advertised products and services, as well as

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<sup>1/</sup> Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, Report and Order, MM Docket No. 95-176, FCC 97-279, (Adopted August 7, 1997; Released August 22, 1997) ("Closed Captioning Order").

<sup>2/</sup> Closed Captioning Order at ¶153.

detailed, on-screen textual disclosures about the products or services, how to order them, and the terms and conditions of the offers. The Commission fails to offer any reason for requiring captioning of long form advertisements that would interfere with presentation of on-screen textual information contained in the program for all viewers. In many cases, closed captioning will physically block (or overlay) the textual material provided to all viewers. The Commission does not explain how the hearing impaired would benefit by a decision which forces them to choose between seeing textual material that describes the product or service, or seeing a transcription of conversation that may consist merely of conversation of marginal relevance to the viewer. There is no reasoned explanation for this.

The fact is that long-form advertisers have every incentive - without regulations - to maximize the reach of their various advertisements. Excluding any significant market segment - such as that comprised of the hearing impaired - would be self-destructive for any advertiser in this fiercely competitive industry. Infomercial television shopping marketers are keenly aware of the need to attract the broadest possible audience; their continued existence and livelihood depends on the mass appeal of the products and services that they offer. The appeal of an ad must also be instantaneous; products and services promoted in long-form ads generally are not available in retail establishments. Long-form direct response advertising must, therefore, be effective in persuading viewers to pick up the telephone and place an order promptly, while they are watching the program or immediately after it concludes. As a result, long-form advertisements present material product information visually to maximize the program's reach, and, therefore, the potential sales market. The Commission acknowledged that short-form advertisers

will voluntarily increase the amount of captioning that they provide as they see increasing benefits of doing so.<sup>3/</sup> The same is true for long-form advertisers. To the limited extent that a handful of long-form ads *might* have a materially more expansive reach with closed captions than without them, the Commission can expect that the program providers will supply captions.

The Commission is equally wrong to assume that long-form advertisements and traditional programming share the same costs and burdens. For instance, because of cost, "traditional" program producers have virtually abandoned pilot shows. By contrast, infomercial producers routinely prepare initial versions of a long-form advertisement to test the program's viability. Limited amounts of advertising time is purchased, often over one weekend, in just a few areas. If the show does not test well, it may be abandoned, in which case the program provider would have incurred the full cost of captioning for a show that may air a total of two or three times in one or two markets over a single weekend. Alternatively, substantial portions of a show that does not test well may be edited or re-recorded, resulting in a considerably different new program. Under the Commission's rules, an infomercial advertiser may be forced to caption each and every version of the same program.

Lastly, while providers of traditional programming reap profits from selling their programs, the advertising availabilities during their programs, or both, long-form infomercial advertisers must purchase air time for their program. Even if one could

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<sup>3/</sup> Closed Captioning Order at ¶152.

credibly assume that the raw dollar costs for closed captioning would be the same for a 30-minute infomercial and a 30-minute sitcom, the respective program providers do not have equivalent means to recoup their costs from others in the production and distribution chain and, due to different levels of programming demand, do not have the same leverage to allocate captioning responsibilities. And, as NIMA pointed out in its comments, the margin on many products and services offered through long-form advertising is so low that the added costs of captioning may prevent some advertisers from offering their products at all. Unlike traditional programmers, therefore, long-form advertisers must pass through the expense of closed captioning directly to consumers or forego the program altogether. Re-examination of the decision in terms of its application to long-form advertising is imperative.

**C. THE COMMISSION SHOULD REVISE THE FORMULA FOR  
CALCULATING REVENUE-BASED EXEMPTIONS**

The Commission wisely created two exemptions from the general closed captioning requirements to “address those providers that lack the necessary resources to support a captioning obligation.”<sup>4/</sup> It is indeed true that, as the Commission states, “all providers are not financially equal and that the burden imposed by [the] captioning requirements will vary with the size and resources of the provider.”<sup>5/</sup> Yet, the Commission’s “solution” to this problem effectively excludes long-form advertising.

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<sup>4/</sup> Closed Captioning Order at ¶162.

<sup>5/</sup> Id.

Both exemptions are based on revenues in the prior year. First, no programming provider must spend more than 2% of gross revenues “received from that channel”<sup>6/</sup> to caption new, non-exempt programming. Second, “[n]o video programming provider will be required to expend any money to caption any channel of video programming producing annual gross revenues of less than \$3,000,000.”<sup>7/</sup> Annual gross revenues, however, are measured on the basis of channel revenues. When product sales directly to consumers support a channel, the Commission indicated that the revenue base is determined based on “product sales activity” such as sales commissions and not on “revenues from the actual products offered to” viewers.<sup>8/</sup>

This general - per channel - methodology might be acceptable for broadcasters, networks, or cable operators. It is wholly unworkable for long-form advertisers. The Commission instructs that “channel” revenues be the starting point for determining whether or not a particular program - including an infomercial - must be closed captioned. This makes sense for traditional video programming providers because they typically *sell* or barter their programs to video networks, cable operators, broadcasters, or other programming distributors that want to air them, and the distributor then creates the channel. By contrast, infomercial advertisers ordinarily *purchase* media time that appears on various cable, network, and broadcast channels, and have no control over other

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<sup>6/</sup> Closed Captioning Order at ¶ 164 (emphasis added).

<sup>7/</sup> Id. (emphasis added).

<sup>8/</sup> Closed Captioning Order at ¶ 165.



programming constituting the channel. Revenue generated by long-form advertising is not derived from a channel, but by sales to consumers.

Additionally, since infomercials are broadcast on so many different channels and at so many different times -- including during the exempt late-night daypart -- it will be extraordinarily difficult, and perhaps impossible, for advertisers to determine whether or not a long-form advertisement has to be captioned at all if the available exemptions depend on individual channel revenues. For instance, it would not be clear which channels' revenues should be used as the basis for determining whether 2% has already been spent on captioning; whether the channels' revenues are under \$3,000,000; or to what extent other programming on each channel meets or exceeds the required benchmark levels.

At the same time, as program producers and owners, long-form advertisers may be obliged to provide captions for their programs at the production stage, at least by virtue of contracts with video programming distributors that are, in turn, legally obligated to ensure that they are captioned according to the 8-year transition schedule. Thus, as currently crafted, the Commission's rules leave long-form advertisers with no alternative but to caption every single advertisement. Absent reconsideration by the Commission, the rules will render long-form advertisers the only entities required to caption each and every program they provide, well in advance of the transitional benchmark periods, simply to ensure that they can meet the legal obligations that may be passed on by video programming distributors.

The Commission did, in fact, state that "program providers with annual gross revenues of less than \$3,000,000 during the previous year" are exempt from the

captioning requirements. This suggests that the Commission intended the exemptions to apply to advertisers directly, as they should. But, the statement is at odds with the rule. And, the Commission has acknowledged that it is often most cost-effective to caption a program at the production stage rather than later. Thus, it makes sense to use a more direct revenue measure as a basis for calculating the applicability of either of the two revenue-based exemptions. Yet, as outlined above, other statements in the Commission's Closed Captioning Order might lead others to question this conclusion.

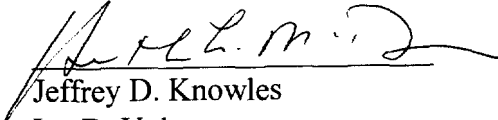
Therefore, NIMA requests that, absent a categorical exemption for long-form advertising, the Commission resolve any possible confusion by revising the exemptions to provide that long-form advertising providers: (1) need not spend on closed captioning more than 2% of gross revenues derived from sales of the advertised product or service in a particular long-form advertisement in the prior year; and (2) do not have to caption any program if the product or service offered in any particular long-form advertisement produced gross revenues under \$3,000,000 in the prior year.

### **CONCLUSION**

The Commission should reconsider its decision require closed captioning of long-form advertising. The balance of burdens and benefits falls heavily against mandatory captioning of such programs, and the Commission has evidently failed to consider the factors that make mandatory captioning both unnecessary and economically unsound. Short of a categorical exemption, however, the Commission must restructure the methodology for applying the two revenue-based exemptions to the rules so that long-form advertisers are equally able to rely on them when appropriate. By design or by

default, the current rules subject long form-advertising to unwarranted burdens that other program providers will not face. The Commission must correct this inequity. In the interim, the Commission must provide immediate relief by staying the application of the rules to long-form advertising.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Jeffrey D. Knowles", is written over a horizontal line.

Ian D. Volner

Heather L. McDowell

Venable, Baetjer, Howard, & Civiletti, L.L.P.

1201 New York Avenue, N.W., Suite 1000

Washington, D.C. 20005

202/962-4800

Counsel for NIMA International

October 16, 1997